THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

GROVER SELLERS
ATTORNEY GENERAL

Honorable W. R. Chambers, Chairman
Revenue & Taxation Committee
Honorable W.W. Roark, Chairman
Insurance Committee
House of Representatives
Forty-ninth Legislature
Austin, Texas

Gentlemen:

Opinion No. O-6443
Re: Constitutionality of House Bill No. 23, and House Bill No. 54, concerning taxes on insurance companies.

We have your request for an opinion as to the constitutionality of House Bill No. 23 and House Bill No. 54, and reply thereto as follows:

House Bill No. 23 provides that the insurance companies therein named shall pay an annual tax equal to three percent (3%) of the gross amount of premiums collected during the year ending December 31, preceding, said tax subject to be reduced, however, as follows:

> ". . . however, if the annual statement of such insurance organization, as of December 31, preceding, shows such organization to have invested in Texas Securities, as defined by Article 4766 of the Revised Civil Statutes of Texas, 1925, as amended, an amount equal to ten (10%) per cent of its admitted assets, then its tax shall be two and seventy-five hundredths (2.75%) per cent of such gross premium receipts; if the annual statement shows such insurance organization to have invested in such Texas Securities on such date an amount equal to fifteen (15%) per cent of its admitted assets, then its tax shall be two and one-half (2½%) per cent of such gross premium receipts; if the annual statement shows such organization to have invested in such Texas Securities on such date an amount equal to eighteen (18%) per cent of its admitted assets, then its tax shall be two (2%) per cent of such gross premium receipts; if the annual statement shows such insurance organization to have invested in such

Texas Securities on such date an amount equal to twenty-two (22%) per cent of its admitted assets, then its tax shall be one and one-half (1½%) per cent of such gross premium receipts; and if the annual statement shows such insurance organization to have invested in such Texas Securities on such date an amount equal to twenty-five (25%) per cent of its admitted assets, then its tax shall be three-fourths of one (3/4%) per cent of such gross premium receipts. . . . . "

House Bill No. 54 amends Article 7064 of the Revised Civil Statutes of 1925 as amended so as to provide that the insurance companies named therein shall pay an annual tax of three per cent (3%) upon the gross amount of premiums received upon property located in this state or other risks located in this state during the preceding year, said taxes subject to be reduced, however, as follows:

". . . if any such insurance carrier shall have as much as ten (10%) per cent of its admitted assets, as shown by such sworn statement, invested in real estate in this state; bonds of the State of Texas; bonds or interest bearing warrants of any county, city, town, school district or any municipality or subdivision which is now or may hereafter be constituted or organized and authorized to issue such bonds or warrants under the Constitution and laws of this state, notes or bonds secured by mortgage or trust deed insured by the Federal Housing Administrator; the case deposits in regularly established national or state banks or trust companies in this state on the basis of average monthly balances throughout the calendar year; that percentage of such insurance company's investments in the bonds of the United States of America, that its Texas Reserves are of its total reserves; but this provision shall apply only to United States Government Bonds purchased between December 8, 1941 and the termination of the war in which the United States is now engaged; in any other property in this state in which by law such insurance carriers may invest their funds, then the annual tax of any such insurance carrier shall be two and seventy-five hundredths (2.75%) per cent of its said gross premium receipts; if any such insurance carrier shall have invested in such securities on such date as much as fifteen (15%) per cent of its admitted assets, then the annual tax of such insurance carrier shall be two and one-half (2½%) per cent of such gross premium

receipts; if any such insurance carrier shall have invested in such securities on such date as much as eighteen (18%) per cent of its admitted assets, then the annual tax of such insurance carrier shall be two (2%) per cent of such gross premium receipts; if any such insurance carrier shall have invested in such securities on such date as much as twenty-two (22%) per cent of its admitted assets, then the annual tax of such insurance carrier shall be one and one-half (1½%) per cent of such gross premium receipts; and if any such insurance carrier shall have invested in such securities on such date as much as twenty-five (25%) per cent of its admitted assets, then the annual tax shall be three-fourths (3/4%) of one (1) per cent of such gross premium receipts. ....."

House Bill No. 54 also provides that foreign assessment casualty companies admitted to do business in Texas under Chapter 5, Title 78, Revised Civil Statutes of Texas of 1925, shall also pay a tax of three percent (3%) of their gross premium receipts from Texas business, said tax subject to be reduced, however, as follows:

". . . Provided, however, if any such company shall have an amount equal to one half of the gross amount of assessments, dues, premiums, or other amounts collected from policyholders within this State during the preceding year, as shown by the sworn statement herein required to be filed, invested in any or all of the above-mentioned securities, then the annual tax of such company shall be one and one-half (1½%) per cent of its said receipts for such preceding period, and if such company shall have invested as aforesaid an amount equal to the gross amount of such receipts for the preceding year, as shown by said sworn statement, then the annual tax of such company shall be one-half (½) of one (1) per cent of its said receipts.

". . . . ."

Article 1, Section 8, of the Constitution of the United States, is in part as follows:

"The Congress shall have Power . . . .

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

". . . . ."

The United States Supreme Court recently held in the case of United States v. South-Eastern Underwriters Association et al., 88 Law Ed. 1082, that the business of insurance, when some of its activities are across state lines, is inter-state commerce and comes within the inter-state commerce clause of the United States Constitution, therefore, there is raised the question of whether or not House Bill No. 23 and House Bill No. 54 are constitutional, on the ground that they are discriminatory as between domestic and foreign companies doing business in Texas.

We have recently received from Honorable Fred Hansen, First Assistant Attorney General of Oklahoma, a memorandum on this question wherein he was dealing with a similar law that was before the Legislature of Oklahoma. We agree with the memorandum so prepared, therefore, we here quote and adopt same:

> "Would a proposed law of this State, levying an annual tax against both domestic and foreign insurance companies doing business in Oklahoma, equal to 3% of the total amount of premiums, less authorized deductions, collected thereby from Oklahoma business during a calendar year, for the privilege of doing business in Oklahoma during the succeeding license year, be an invalid discriminatory law within the meaning of the Commerce Clause of the Constitution of the United States, <u>if said law in effect provides</u>, as stated in its title, that:
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> > such tax shall be two and seventy-five hundredths (2/75%) per cent if ten (10%) per cent of such companies' admitted assets are invested in Oklahoma securities, two and one-half (2½%) per cent if fifteen (15%) per cent of such companies' admitted assets are invested in Oklahoma securities, two (2%) per cent if eighteen (18%) per cent of such companies' admitted assets are invested in Oklahoma securities, one and one-half (1½%) per cent if twenty-two (22%) per cent of such companies' admitted assets are invested in Oklahoma securities, three-fourths of one (1%) per cent if twenty-five (25%) per cent of such companies' admitted assets are invested in Oklahoma securities, one-half of one (1%) per cent if thirty-five

(35%) per cent of such companies' admitted assets are invested in Oklahoma securities, and no tax if fifty (50%) per cent of such companies' admitted assets are invested in Oklahoma securities?

"It is contended that the above proposed law is non-discriminatory for the asserted reason that both domestic and foreign insurance companies doing business in this State can invest any percentage of their admitted assets in Oklahoma securities that they desire, and that the mere fact that most domestic insurance companies have approximately 50% of their admitted assets invested at this time in Oklahoma securities and hence would not be required to pay any part of said 3% tax while most foreign insurance companies have less than 10% of their admitted assets invested at this time in Oklahoma securities and hence would be required to pay all of said 3% tax, is immaterial.

"In this connection attention is called to a recent memorandum prepared by Professors Dowling and Patterson of the School of Law of Columbia University for certain committees of the American Life Convention and for the Life Insurance Association of America wherein the important case of Bethlehem Motors Co. v. Flynt, 256 U.S. 421, 65 L. ed 1029 (1921) was reviewed as follows:

"'North Carolina required a license tax of $500 of all persons or corporations engaged in selling automobiles within the State, and the statute contained a proviso that if three-fourths of the "entire assets" of the manufacturer of the automobiles were invested in securities of, or in property located within, the State, the tax should be reduced to $100. Plaintiffs (including two foreign corporations engaged in the manufacture of automobiles and two domestic corporations engaged in the sale) attacked the statutory scheme as a denial of equal protection of the laws and as a regulation of interstate commerce. They won on both grounds. If the sales were considered wholly intrastate, that is, occurring after the interstate transaction was completed, there was "a real discrimination" contrary to

the equal protection clause of the Fourteenth Amendment; if, on the other hand, the sales were considered a part of the interstate transaction, the commerce clause stood in the way.'

"Inasmuch as the Bethlehem case, supra, probably is the case most directly in point as to the issues raised in this memorandum the syllabus is quoted herein as follows:

"'1. Foreign corporations doing business in a state, and having an agent there, are within the jurisdiction of the state for the purpose of suit against them.

"'2. A state act imposing a license tax upon all manufacturers or persons or corporations engaged in selling automobiles in the state unconstitutionally discriminates against nonresident manufacturers doing business in the state through local sales agents, where it reduces the tax to one fifth of its normal amount if the manufacturer of the automobiles has three fourths of his assets invested in the bonds of the state or of some of its municipalities, or in other property situated therein and returned for taxation.

"'3. The imposition of a state license tax upon local agents to whom automobiles are consigned for sale by their nonresident manufacturers, which discriminates in favor of the product of resident manufacturers, is an unconstitutional attempt by the state to regulate interstate commerce, it being in effect a tax upon the importation of the automobiles into the state.'
"

"In the body of the opinion appears the following language:

"'It will be observed, however, that the act under review applies to all manufacturers and persons engaged in selling automobiles in the state. The act makes no distinctions between nonresident and resident manufacturers. Wherein, then, is

there discrimination? It is contended to be in the provision which reduces the tax to one fifth of its amount--from $500 to $100--if the manufacturer of the automobiles has three fourths of his assets invested in the bonds of the state or some of its municipalities, or in other property situated therein, and returned for taxation. The provision is declared to be impossible of performance, and its effect to be that a manufacturer not having such investment of property is charged $500 for a license, and one having such investment of property is charged only $100. And plaintiffs in error, it is asserted, are necessarily in the $500 class. The contrasting assertion is that local manufacturers are in the $100 class, and that , therefore, there is illegal discrimination in their favor. * * * *

"'In resistance to the assertion that the provision discriminates against nonresident manufacturers, the attorney general contends that it is as applicable to resident manufacturers as to nonresident manufacturers, and, of course, his inference is that its condition can be performed as easily by one as by the other, and discriminates against neither.

"'To this we cannot assent. The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the state; it cannot be satisfied by a nonresident manufacturer, his factory necessarily being in another state, some of its products only at a given time being within the state. Therefore, there is a real discrimination, and an offense against the 14th Amendment, if we assume that the corporations are within the state.

"'If they are not within the state, their second contention is that the act is an attempt to regulate interstate commerce. If it have that effect it is illegal; for a tax on an agent of a foreign corporation, for the sale of a product, is a tax on the product, and if the product be that of another

state, it is a tax on commerce between the states. * * *'

"The principles of law announced in the above case were followed in the case of Best & Company, Inc. v. Maxwell, Commissioner of Revenue for the State of North Carolina, 311 U.S. 454, 85 L. ed 275, the syllabus being as follows:

"'1. The commerce clause forbids discrimination, whether forthright or ingenious.

"'2. Whether a state statute unconstitutionally discriminates against commerce is to be determined, not by the ostensible reach of its language, but by its practical operation.

"'3. A state statute levying an annual privilege tax of $250 on every person or corporation not a regular retail merchant in the state, who displays samples in any room rented or occupied temporarily for the purpose of securing retail orders, unconstitutionally discriminates against commerce, where the only tax to which regular retail merchants in the state are subject is a tax of $1.00 per annum for the privilege of doing business, even where they engage in the sale of goods by sample in display rooms at places other than that in which their retail stores are located.'

"In the body of the opinion it is stated:

"'The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation on work discrimination against interstate commerce.'

"Probably the most recent decision involving issues such as are presented in this memorandum is General Trading Company v. State Tax Commission of the State of Iowa, _____ U.S. _____, 88 L. ed 914, the third paragraph of the syllabus being as follows:

> "'While no state can tax the privilege of doing interstate business, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce, does not exempt it from state taxation, so long as such taxation is not obviously hostile or practically discriminatory toward such commerce.'
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> "In the body of the opinion it is stated:
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> "'Of course, no State can tax the privilege of doing interstate business. See Western Live Stock v. Bureau, 303 U. S. 250, 82 L ed 823, 58 S Ct 546, 115 ALR 944. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which it may draw from a State to the upkeep of which it may be asked to bear its fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See Best & Co. v. Maxwell, 311 US 454, 85 L ed 275, 61 S Ct 334.'

"In consideration of the principles of law announced in the above decisions it is clear that a state law which either on its face, or as a matter of practical application, discriminates against a foreign insurance company doing business in this State would be invalid under the Commerce Clause of the Constitution of the United States.

"The contention that the proposed law, heretofore referred to, is non-discriminatory for the asserted reason that both domestic and foreign insurance companies doing business in this State can invest any percentage of their admitted assets in Oklahoma securities that they desire, and that a foreign insurance company by investing 50% of its admitted assets in Oklahoma securities can, like a domestic insurance company, escape payment of said 3$ privilege tax, apparently does not take into

consideration the practical operation of said proposed law. In this connection it will be noted:

> "(a) that if said proposed law is valid a similar law in each of the other states would likewise be valid, and that if such laws have been or are enacted it will be impossible for an insurance company doing business, for instance, in 40 of the 48 states to invest 50% of their admitted assets in each of said states,
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> "(b) that since, for example, the Metropolitan Life Insurance Company has admitted assets aggregating approximately $6,463,803,552.00, it would be required under said proposed law to invest approximately $3,231,901,776.00 of said assets in Oklahoma in order to escape said tax even though the total amount of premiums collected in Oklahoma during the last reported calendar year only aggregated $2,511,649.00, and
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> "(c) that it would be a practical impossibility for said company to purchase $3,231,901,776.00 in Oklahoma securities."

In addition to the decisions referred to by Mr. Hansen, we direct your attention to the following:

In the case of Gwin, White and Prince, Inc., v. Henneford, 83 L. Ed. 272, the Supreme Court of the United States had under consideration the question of whether or not a Washington tax measured by the gross receipts from the business of marketing fruit shipped from Washington to the places of sale in various states and in foreign countries was a burden on interstate commerce under the Commerce Clause of the Federal Constitution. In holding said tax unconstitutional on the ground that it was a violation of said Commerce Clause, in that it was not limited to receipts from the activities within the state but applied to gross receipts from activities both within and without the state, the court laid down the following rules of law which are applicable here:

> "While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly

performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce--the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume.

". . . . But it is enough for present purposes that under the commerce clause, in the absence of congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state, see Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 S. Ct. 107; Maine v. Grand Trunk R. Co. 142 U.S. 217, 35 L. ed. 994, 12 S. Ct. 121, 163, 3 Inters. Com. Rep. 807; Cudahy Packing Co. v. Minnesota, 246 U.S. 450, 62 L. ed. 827, 38 S. Ct. 373; United States Exp. Co. v. Minnesota, 223 U.S. 335, 56 L. ed. 601, 12 S. Ct. 810, 4 Inters. Com. Rep. 79, and American Mfg. Co. v. St. Louis, 250 U.S. 459, 62 L. ed. 1084, 39 S. Ct. 522, supra, burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical

> operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. J. D. Adams Mfg. Co. v. Storen, supra (304 U.S. 310, 311, 82 L. ed. 1368, 1369, 58 S. Ct. 913, 117 A.L.R. 429); of. Fargo v. Michigan (Fargo v. Stevens) 121 U.S. 230, 30 L. ed. 888, 7 S. Ct. 857, 1 Inters. Com. Rep. 51; Philadelphia & S. Mail S.S. Co. v. Pennsylvania, 122 U.S. 326, 30 L. ed. 1200, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308; Galveston, H. & S.A. R. Co. v. Texas, 210 U.S. 217, 225, 227, 52 L. ed. 1031, 1036. 1037, 28 S. Ct. 638; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 S. Ct. 218; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126; Fisher s Blend Station v. Tax Commission, 297 U. S. 650, 80 L. ed. 956, 56 S. Ct. 608; see Western Live Stock v. Bureau of Revenue, supra (303 U. S. 260, 82 L. ed. 830, 58 S. Ct. 546, 115 A.L.R. 944). Such a multiplication of state taxes, each measured by the volume of the commerce, would re-establish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden.
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> ". . . . . "

In the case of Postal Telegraph Cable Co. v. Adams 39 Law ed. 311, the Supreme Court of the United States was passing upon the right of the state to levy a charge upon a foreign telegraph company, doing business within the state and also doing an interstate business, in the form of a franchise tax, but arrived at with reference to, and graduated according to, the value of the property within the state and in lieu of all other taxes, and this right was upheld as not being a regulation of interstate commerce and did not put an unconstitutional restraint thereon.

In the case of Looney v. Crane Co., 62 L. Ed. 230, the Supreme Court of the United States was passing upon Texas statutes which required foreign corporations to file their articles of incorporation with the Secretary of State and to pay certain permits and franchise taxes based upon the amount of their capital stock. These amounts had been increased from time to time until this suit was brought by the Crane Co. to enjoin the enforcement of

such statutes on the grounds that they were repugnant to the Commerce Clause of the Constitution of the United States, as well as to the due process and equal protection clauses thereof. In holding that the enforcement of said statute should be enjoined, the court held:

> "It may not be doubted under the case stated that, intrinsically and inherently considered, both the permit tax and the tax denominated as a franchise tax were direct burdens on interstate commerce, and, moreover, exerted the taxing authority of the state over property and rights which were wholly beyond the confines of the state, and not subject to its jurisdiction, and therefore constituted a taking without due process. It is also clear, however, that both the permit tax and the franchise tax exerted a power which the state undoubtedly possessed; that is, the authority to control the doing of business within the state by a foreign corporation and the right to tax the intrastate business of such corporation, carried on as the result of permission to come in. The sole contention, then, upon which the acts can be sustained, in that although they exerted a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount, but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is unnecessary, since to state the proposition is to demonstrate its want to foundation, and because the fundamental error upon which it rests has been conclusively established. Indeed, the cases referred to were concerned in various forms with the identical questions here involved, and authoritatively settled that the states are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the state, in violation of the Constitution, or, because of the right to exclude, to exert the

power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the state, in disregard, not only of the commerce clause, but of the due process clause of the 14th Amendment. . . . . "

Many other decisions might be referred to and quoted from in line with the above holdings and, while said House Bill No. 23 and House Bill No. 54 contain the same provisions as to domestic and foreign insurance companies, the difference, and possible discrimination, arises in the application of said provisions whereby said taxes are reduced. It is very likely that domestic companies will have most, if not all, of their admitted assets invested in property and Texas securities whereby the amount of said taxes can be reduced, and it is just as likely that foreign companies will have their admitted assets invested in their home and other states, possibly under similar provisions in the laws of said other states, and in many instances it will be almost impossible for such companies to comply with the provisions of these bills in order to reduce the amount of their taxes as can be done by domestic companies. As an illustration of what we are trying to say, we call your attention to the report of a foreign insurance company which was filed with the Board of Insurance Commissioners and which would furnish the basis for compliance with these bills. Its admitted assets were $1,456,973.26; its total reserves were $1,047,577.00; its Texas reserves were $30,827.00; its required investments of its Texas reserves which is necessary in order to secure a permit to do business in Texas was $23,120.00; and its gross premiums for the preceding year were $13,000.00. In order to avail itself of the reduction in tax as is given to domestic companies under these bills, it would have to invest the required percent of its admitted assets. If it were also doing business in other states which had the same requirements, it would hardly be possible for such companies to meet the requirements of this law and secure the same tax rate as domestic companies can have by merely investing their property in their home state. In addition, it would seem to be an attempt to compel foreign companies to bring into Texas assets accumulated from business done in other states and over which Texas has no jurisdiction.

We have devoted a lot of time to a study of the various questions raised by the decision in the South-Eastern case and, while we have not found any decision dealing with a similar situation since the question had not been heretofore raised as to insurance, the decisions above referred to, as well as many others we have read, cause us to have great doubt that said bills, as now written, can or will be upheld, since they may be held to be discriminatory and in violation of the

Commerce Clause of the Constitution of the United States.

Trusting that this satisfactorily answers your request, we remain

Very truly yours

ATTORNEY GENERAL OF TEXAS

By s/Ardell Williams
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APPROVED MAR 3, 1945
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Approved Opinion Committee By s/WMR Chairman